BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Summary of argument.

I.

The findings made by the Interstate Commerce Commission are wholly insufficient to enable the Court to perform its function under Section 77 of the Interstate Commerce Act.

II.

The Court may not substitute the results of balloting by creditors for (a) the failure of the Commission to make necessary findings, and for (b) the informed, independent judgment of the Court as to whether the plan of reorganization is fair and equitable.

III.

The plan of reorganization as approved and confirmed is not fair and equitable and does not meet the tests required by the law of the land.

ARGUMENT.

A statement of the case has been presented in the petition for writs of certiorari and will therefore not be here repeated. We understand that a petition for review by this Court need not and should not take the place of a brief on the merits of all issues involved in the proceedings. It is our purpose simply and briefly to show that this Court should review the action of the Court below. It well may be that the face of the pleadings discloses sufficient for the Court to determine that, in the interest of expedition, the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the case remanded with directions to reverse the orders and the decree of the District Court, and to remand the proceedings to the Commission for further proceedings, in accordance with the law, as was done by the same Circuit Court of Appeals in the case of *In re Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 124 F. (2d) 754, decided December 4, 1941, now also the subject of a petition for writs of certiorari in Docket Nos. 875-883. The Debtor, however, desires to file a brief on the merits and to be heard at oral argument if there is to be any determination by this Court of the many important issues of law presented by these proceedings.

I.

The findings made by the Interstate Commerce Commission are wholly insufficient to enable the Court to perform its function under Section 77 of the Interstate Commerce Act.

In the opinion of the Circuit Court of Appeals in *In re Chicago, Milwaukee, St. Paul & Pacific R. R. Co., Debtor, supra,* the Court said that the fairness of any reorganization plan presents a legal question which the Court cannot and should not evade or avoid. The Court stressed the decision of this Court in *Consolidated Rock Products Company* v. *DuBois,* 312 U. S. 510, 85 L. Ed. 982, saying that the opinion in that case pointed the way and laid down the rules for the guidance of the Circuit Court of Appeals, and said of that opinion that it is quite clear it "must be our text for determining the disposition of this appeal."

The opinion of the Circuit Court of Appeals in that case listed the holdings of this Court in the *Consolidated Rock Products* case, *supra,* which it considered pertinent and included the following (124 F. (2d) 754, 762-3):

> "(a) The necessity of the application of the absolute priority principle to reorganizations of solvent and insolvent corporations;
>
> "(b) Interest accrued on bonds (not contingent interest which has not been earned) is entitled to the same priority as the principal;
>
> "(c) Future earning capacity of the enterprise is the criterion for the determination of values of assets of commercial corporations, as well as of the practicability and fairness of the plan of reorganiza-

tion, where as here, the assets are productive properties. In railroad reorganizations, values are to be determined by the rule stated in Sec. 77 (e).

* * * * *

"(j) Findings must be made on all vital issues, controverted and uncontroverted, and must include values of properties separately considered and also of Debtor's property as a whole. Findings must cover values of liens to be surrendered and values of securities given in exchange. They should specifically cover the ultimate (not evidentiary facts) facts upon which the values are based. They must show that fixed interest charges are included and show that values are based on income-producing factors."

On page 764 it said:

"In view of the reversal and remanding of this case for the making of findings, which we find it is necessary to order, we will not discuss at great length, or in great detail, the fairness of the plan with respect to these two mortgages. It is sufficient to observe that the fact situation permits of a plan such as the Commission formulated and approved. The plan as such, ignoring the absence of findings, has support in the evidence. It violates no requirements (save findings) announced in the Consolidated Rock Products case."

On page 766 the Court continued:

"This brings us to that phase of this appeal which is based upon the failure of the Commission to make the necessary findings required by the Consolidated Rock Products Company case. There is undoubted support for the argument that the Commission inferentially made findings when it allocated the new securities to the old mortgages. But the fairness of that allocation is dependent upon the findings of fact. Without such findings we cannot intelligently approve or disapprove.

"We appreciate that the findings of fact must, in the last analysis, be based upon evidence, much of which is to be found in the report of the I. C. C.

Hence it may well be argued that the I. C. C. could make such findings by taking notice of its reports and the statistical information in its files bearing upon the income of this railroad and of its various branches. Reluctant as we are to do so, we nevertheless feel that under the decision of this controlling case, there must be a return of the cause to the District Court with direction to the District Court to return it to the I. C. C. and for that body to make the findings on issues vital to the question of values and equities as announced in said Consolidated Rock Products case. *Likewise, the findings must be so specific that the court may definitely see that in the new plan, provision for full compensation of cancelled old senior securities, and all prior preferred positions, is made.* The findings must be sufficiently complete on these matters, that the court may, from its examination, ascertain whether full compensation has been made for the entire bundle of rights which each of the creditors is called upon to surrender.

"It would be begging the question to assume that findings were necessarily made by the I. C. C. when the allocation was made. We would be delegating to the I. C. C. an obligation which is ours. The Commission must formulate its plan. It must make fact findings supported by the evidence upon which its plan is based. We must independently determine whether the plan is fair and equitable. In reaching our conclusion we must ascertain (a) whether there is evidence sufficient to support the findings and (b) we must be able to say that the findings support the plan, and (c) the plan is fair and equitable." (Court's own italics.)

Specifically the Court then continued:

> "As to the necessity and character of the findings, the court in the Consolidated Rock Products case spoke and the rule it announced applied to the I. C. C. in railroad reorganizations as fully as it applies to the District Court in other reorganization cases. Save as modified by Sec. 77 (e) the Commission should follow the opinion in that case."

Yet that same Court in the instant case said in its opinion (Tr. 5813):

> "The objection we are dealing with,—a failure of the findings of the I. C. C. to be sufficiently specific,—presents a procedural question. True, in many instances, this procedural question looms large and may be of controlling importance. Nevertheless, it is not jurisdictional in character. We are satisfied that different facts and a *different law*, under which the reorganization of railroads is authorized, *distinguishes* this case from the *Consolidated Rock Products* case." (Italics ours.)

In the *Milwaukee* case the Court said as to findings, at page 766 of 124 F. (2d):

> "In the report of the Commission there is a discussion of the various factors which were deemed pertinent in its inquiry into values. Absent, however, were clear cut findings or values which are so essential to the intelligent approval of the plan. Our criticism is not directed to the fact that the findings were embodied in the Commission's report (a large part of which is devoted to a discussion and statement of the evidence) rather than stated specifically as findings. But the fault lies in the fact that we are left uncertain, or in the dark, as to the finding of the Commission. The evidence might support a finding of a larger or a smaller amount. Which should we accept? The fact finding body is the I. C. C. It must find. We cannot.
>
> "Somewhat similar was the situation in the case of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 162, a case which arose from a three judge district court in this circuit. In the absence of specific findings the Supreme Court set aside the decree and remanded the cause to make the necessary and appropriate findings. It refused to accept the conclusions of the District Court as inferential expressions of its fact conclusions. See also *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67; *United States* v. *Magnolia Petroleum Co.*,

276 U. S. 160, and *Universal Battery Co.* v. *U. S.*, 281 U. S. 580."

Yet in the instant case the same Court said, in discussing the classes of creditors where over 96% of those voting had approved the plan (Tr. 5808):

> "It is not a question of a necessary majority (two-third). The majority in each group, in the case before us, was far greater than the minimum requirement. It is a question of whether the report of the I. C. C., which was full and complete, fair and open, but lacking in one respect,—failure to make specific findings of values,—may, or should, be approved without said findings. In fact, the issue may be stated even more strongly against the minority. Does not the vote of approval supply the proof that the report of the Commission contained the evidence, and the Commission's finding sufficiently states the facts, to justify us in holding that separate and more detailed findings are unnecessary? We think it does."

When we view these expressions just quoted, a question arises at once as to whether the Circuit Court of Appeals reached the conclusion that the various classes of creditors were better able to appraise the report of the Interstate Commerce Commission, approving a plan of reorganization for the Chicago and North Western Railway Company, than the Court of Appeals itself in appraising the report of the Commission, in approving a plan of reorganization for the Milwaukee, where there had been no submission of the plan to creditors for vote of approval or disapproval. We quote further from the opinion of the Circuit Court of Appeals in the instant case (Tr. 5808):

> "We have no doubt that if the decision in *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510, had been announced before the findings of the I. C. C. in this case, the evidence which was before the I. C. C. would have been collected and stated in formal find-

> ings rather than in explanatory statement and fact assumptions. The story, factual and statistical, however, was all told. Its more important features were related in reports of an examiner and later, in the report of the I. C. C.* (*Both overflowing with material facts and records of volume of business, earnings, and trends.)"

In an attempt to distinguish the *Milwaukee* case from the *North Western,* the Court in the latter opinion used the following language which is directly contrary to the language in *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, saying, at Tr. 5805 (our italics):

> "This case differs from the Milwaukee case in this respect. Here, the creditors have received the plan and voted, almost unanimously, their approval of it. Our question then is not restricted to the sufficiency of findings to support the plan, but it is a review of a plan *which has the approval of the various groups of creditors.** The stockholders are eliminated. The creditors alone are entitled to the assets of the debtor. They are also entitled to a fair allocation of new securities in view of the value of their old bonds, having due regard to the value of the liened property and the future earnings of the road.
>
> "While fairness is a somewhat relative term and is not measurable, in its practical application, with mathematical certainty, courts will not go beyond the expressed assent and approval of the bondholders to ascertain whether fairness in distribution attained the goal of perfection. If the creditors who are to share an insolvent estate understandingly agree on a division thereof, the problem of the court has been solved."

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* The Court of Appeals in its opinion in the instant case nowhere finds that "the approval of the various groups of creditors" was not secured by means forbidden by law, and does not mention that of the total outstanding securities of $354,178,080, held by creditor classes authorized to vote on the plan, only $222,174,728, or 62.7 per cent of the total outstanding, voted to accept the plan. Moreover, the Insurance Group and the Savings Bank Group held 53 per cent of the total voting to accept the plan. Eight of the eighteen appeals disposed of by the Circuit Court of Appeals in its decision were from orders and decrees entered prior to the vote on acceptance of the plan.

This expression just quoted ignores the fact that the Debtor is not insolvent and there has been no finding to that effect by the Commission nor by the Court. Its petition for reorganization merely stated that it was unable to meet its debts as they matured. Also these creditors could not be said to have agreed "understandingly," when they were not advised in the balloting papers of the pending appeals. The Court did not in its opinion pass on the question of the fairness of the vote, and, if the creditors alone can control, the interest of the public is completely ignored since, as the Court says at Tr. 5811, in the North Western opinion, this is a quasi-public institution.

The opinion also ignores the fact that seven of the appeals covered by the opinion were from the order approving the plan and one was from the order denying Debtor's motion to refer the plan back to the Interstate Commerce Commission, both of which orders were entered prior to the submission to the creditors. How can the appellants lose their right to have those appeals decided as of the time the orders were entered? Shall it be said that because the Debtor could not afford a supersedeas bond and the District and Circuit Courts refused to stay the proceedings as to certification, all appellants have waived their appeals from the approval order? And is not the Circuit Court of Appeals required to decide the validity of the order refusing to send the plan back to the Commission for determination of value, as of the time of entry of the order and as to which no question of approval by creditor vote is pertinent?

Moreover, if the plan were legally unfair, inequitable or contrary to law, how could the stockholders be held to have had due process where the Court affirms solely on the ground of waiver by the creditors of necessary findings?

The stockholders (who suffered the greatest loss) had been deprived of their right to vote so that they could not be said to have waived any of their objections to lack of findings and the many other specific objections raised to the validity of the plan. It is true that the Court in the instant case affirms the lack of value in the equity, but it pointed out in the *Milwaukee* case that a finding of value of the properties of the reorganized company was essential to a determination of whether or not the plan was fair and equitable, and we maintain that it is likewise necessary to have a finding of value of Debtor's properties before there can be an intelligent determination of value or lack of value in the equity. Even in the second opinion in the *Milwaukee* case, refusing to modify its first opinion to the effect that the evidence supported the finding of the Commission as to the lack of value in the equity of the stockholders, the Court expressly said (Sheet 2 of supplementary opinion, issued January 12, 1942):

> "It follows that this branch of the case, the value of the equity of the debtor, evidenced by the common and preferred stock, is closed, and the I. C. C. need not further investigate or make further finding on this issue unless it is convinced that changed conditions in railroad earnings warrant it. In other words, the I. C. C. has jurisdiction of the matter and may, although it is not required to do so, re-examine the evidence, or receive additional evidence, if in its judgment, justice to the parties requires it."

Nowhere is there any discussion of the possibility of issuance of options or warrants to the thousands of stockholders whose rights have been completely eliminated.

On Tr. 5809, in the opinion herein, the Circuit Court of Appeals says:

> "In short, we hold, the approval of the plan differentiates this case from the Milwaukee case. It

was an equivalent of a waiver of more specific findings by all who approved the plan. It also supplied the proof that the report gave the bondholders sufficient facts to understand and appraise the worth of the plan."

Does it follow that just because one approves of something he understands it? Would not it be just as logical to say that he approves it because he does not understand it, and if he had had sufficient knowledge to appraise it, he would have disapproved it? Elsewhere (page 40 hereof) we quote an expression of the Commission that creditors "frequently are discouraged and uninformed."

The Court proceeds (Tr. 5809):

"Thus far we have considered the effect of the approval of the creditors of the plan submitted by the I. C. C. As to them, the objection that the findings of the I. C. C. are insufficient and lacked specificity, is unavailing."

On Tr. 5810 in the Court's opinion we find:

"If we are correct in our assumption that those who did not vote and those who have neither specifically objected to, nor approved of, the plan, have left it to the court to represent them, we accept the responsibility and vote their interest in favor of the plan. While the responsibility for acting both as umpire and as guardian for the many small and unknown bondholders scattered throughout the United States is a somewhat large one, we are not at liberty to decline it, nor to avoid its burden. Our approval of the plan is so whole-hearted that we have no hesitancy in the matter. All arguments seem to favor approval.

"We favor it, because:

"All the creditors of each group who have voted, are overwhelmingly in favor of it.

"Such a plan, if consummated, would terminate these lengthy proceedings. * * *"

Are these valid reasons for approving a plan and voting as guardian for all those who did not vote? Could not these two reasons exist just as well with a most unfair, inequitable and illegal plan if the creditors in their discouragement and ignorance had approved it?

Further (Tr. 5810-11), the Court says:

> "Numerous plans have been submitted, none of which meets with as much satisfaction as the one before us. The present plan can not be compared with perfection, for perfection would provide for payment of one hundred per cent cash to each bondholder. Also, the stockholders would be given dividend bearing stock. Unfortunately, the revenue of the Debtor makes it necessary to face realities, not act on unfounded hopes, or dwell in air castles."

Finally, on the question of waiver, the Court says (Tr. 5812-13):

> "Had the necessary percentage of bondholders not voted for the plan, or the District Court had not made favorable findings in the case of a single group whose bondholders had failed to give a two-thirds majority in favor of the plan, we would have been confronted by an insurmountable jurisdictional objection. Such, however, is not the situation. The objection we are dealing with,—a failure of the findings of the I. C. C. to be sufficiently specific,—presents a procedural question."

Yet upon that single "procedural question" the same Circuit Court of Appeals reversed the order of approval of the Milwaukee plan. Certainly the Milwaukee opinion would lead one to suppose the Court considered the objection to be one going to jurisdiction, rather than being "procedural."

There is no real difference between the *Milwaukee* case and the instant case of the North Western with reference to lack of findings by the Commission as to values. The

same absence of requisite findings to enable the Court to determine whether the plan of reorganization is fair and equitable, which compelled the Court of Appeals to send the *Milwaukee* case back to the Commission, exists in this case, and the Court of Appeals should have sent these proceedings back to the Commission to determine and certify values of the Chicago and North Western Railway Company, the Debtor herein.

II.

The Court may not substitute the results of balloting by creditors for (a) the failure of the Commission to make necessary findings, and for (b) the informed, independent judgment of the Court as to whether the plan of reorganization is fair and equitable.

We have at perhaps undue length contrasted the opinions of the Circuit Court of Appeals in the *Milwaukee* case and in the instant case; the only differentiation, as the Court points out quite frankly, is the approval of the plan by the creditors.

In the petition for writs of certiorari, we have set forth a quotation from the opinion of this Court by Mr. Justice Douglas in the *Los Angeles Lumber Products* case, *supra*, where it is specifically held that the Court must exercise its independent judgment as to whether a plan of reorganization is fair and equitable as a matter of law. The Court is not merely a ministerial register of votes of several classes of security holders. The approval by the classes of creditors voting on the plan of reorganization in the instant case upon which the Circuit Court of Appeals relies so completely was not "overwhelming." Only 62.7 per cent of the security holders authorized to vote on the plan voted to accept it, and of those voting to accept the plan, the Insurance Group and the Savings Bank Group constituted 53 per cent.

Prior to the amendment of Section 77 on August 28, 1935, the law required acceptances by two-thirds of each class of creditors. Counsel and officers representing various life insurance companies, who are parties to these proceedings, appeared before the Committee on the Judiciary, House of Representatives, 74th Congress, 1st Session, in April, 1935, and urged an amendment to Section 77 as it then stood, so as to provide that acceptance of a plan of reorganization necessary to bind the minority of a particular class should be changed from an affirmative vote of two-thirds of the total outstanding securities of a particular class to an affirmative vote of two-thirds of those who vote. (Page 75 of the hearings)

The representatives of these life insurance companies at that time informed the Judiciary Committee that life insurance companies of the country as a whole hold $3,000,000,000 of railroad bonds, out of the $12,000,000,000 outstanding; the sixteen life insurance companies represented by counsel at that hearing held $2,000,000,000 of such bonds. Likewise counsel for mutual savings banks of the United States, many of whom are parties to these proceedings, appeared in support of the same amendment, stating that the investments of mutual banks in railroad bonds range between $1,600,000,000 and $1,700,000,000. (Pages 101-102 of the hearings)

As a result of these hearings, Section 77 was amended August 27, 1935, so as to provide that acceptance would bind the minority where two-thirds of those voting in each creditor class accepted the plan of reorganization. While the Life Insurance Group and Savings Bank Group, parties to these proceedings, hold only 33.2 per cent of the outstanding securities of the Debtor, they were able to cast 53 per cent of the votes of acceptance of the plan in the aggregate. There has been no finding of insolvency of

the Debtor and it is unthinkable that acceptances under the circumstances shown by this record should operate as a finding that the plan of reorganization is fair and equitable.

In the table opposite this page are shown the holdings of these creditor groups of Debtor's securities and the ratio of those holdings to the outstanding securities and to the securities voting on the submission by the Commission.

Creditor Class	Total outstanding (Note a)	Total voting to accept plan (Note a)	Total held by insurance group (Note b) and savings bank group (Note c)	Percentage holdings of insurance group and savings bank group to total outstanding	Percentage of holdings of insurance group and savings bank group to total vote to accept plan
5. Preferred claims	$ 25,823	$ 25,823	$		
6. General mortgage bonds, 1987	132,019,000	96,654,500	69,260,000	52.5	71.7
7. Sioux City & Pacific R. R. bonds	4,000,000	3,464,000	2,713,000	67.8	78.3
8. Milwaukee & State Line bonds	2,500,000	1,083,000	1,003,000	40.1	92.6
9. Manitowoc, Green Bay & North Western bonds	3,750,000	3,169,000	2,526,000	67.4	79.7
10. St. Paul Eastern bonds	1,120,000	667,000	645,000	57.6	96.7
11. Milwaukee, Sparta & North Western bonds	15,000,000	9,626,000	7,862,000	52.4	81.7
12. Des Plaines Valley bonds	2,500,000	1,847,000	1,353,000	54.1	73.3
13. St. Louis, Peoria & North Western bonds	10,000,000	7,191,000	5,452,000	54.5	75.8
14. 1st and refunding bonds, 2037	47,822,000	24,090,000	14,994,000	31.4	62.2
15. 15-year 6½% bonds	14,775,000	8,505,000	5,168,000	35.	60.8
16. Convertible 4¾% bonds	72,335,000	18,602,000	6,710,000	9.3	36.1
18. Collateral promissory notes	42,313,882	47,049,192			
21. General claims	1,017,375	201,213			
	$354,178,080	$222,174,728	$117,686,000	33.2	53.

(a) Taken from Commission's certificate of May 13, 1941.

(b) Insurance group holdings, printed record in District Court pages 624-5. (Tr. 291)

(c) Savings bank group holdings, printed record in District Court pages 3722-3. (Eliminated from printing by stipulation approved by this Court, Tr. 5201)

At the hearing before the House Judiciary Committee on April 15, 1935, on H. R. 6249, proposing to amend Section 77, 74th Congress, 1st Session, Joseph B. Eastman, Federal Coordinator of Transportation, appeared in support of that bill and presented a statement embodying the recommendations of the Interstate Commerce Commission, which is attached as an appendix to his statement, where it is stated, at page 22 of said hearings:

> "One cause of dissatisfaction with the equity procedure has been the absence of a real adjudication, owing to the inclination of the courts to confirm reorganization plans in circumstances where the confirmation was frequently based upon no real scrutiny of the plan or determination of the justice of the settlement of the important issues involved. *The votes of creditors and stockholders, who frequently are discouraged and uninformed, are not evidence of the fairness or justness of a reorganization plan, whereby minorities are bound.* Such minorities cannot complain of the substitution of a complete adjudication by the Commission and the court of the rights of the parties." (Our italics.)

We call attention to this opinion of the Commission as indicating that the fairness and justness of a plan is to be determined by the Court independent of and unaffected by the votes of creditors, as the latter affords no basis for, and may not be substituted for, an informed independent judgment of the Court that the plan is fair and equitable.

It cannot be doubted that the decision of the Circuit Court of Appeals in the instant case was based upon the fact that the necessary majority of creditors of each group which voted, favored the plan. This Court said in so many words that to hold a plan is fair and equitable because the requisite percentage of the class of security holders had approved it, made "the judicial determination on the issues of fairness a mere formality and would

effectively destroy the function and the duty imposed by the Congress on the District Courts." *Case* v. *Los Angeles Lumber Products Co., supra.*

The ballot box of creditors receiving a property under a plan of reorganization may not be substituted for the independent judgment of the court. This Court may well dispose of the petition for writs of certiorari in this case by simply reversing the decision of the Circuit Court of Appeals herein, on the authority of the case cited, with directions to remand for further necessary findings as required by the decision of the Circuit Court of Appeals in the *Milwaukee* case.

III.

The plan of reorganization as approved and confirmed is not fair and equitable and does not meet the tests required by the law of the land.

On June 8, 1940, Debtor filed its objections to the plan of reorganization as approved and certified by the Interstate Commerce Commission to the District Court. (Tr. 4000)

The opinion of the Circuit Court of Appeals deals specifically only with those objections filed by the Debtor which relate to the treatment of the Reconstruction Finance Corporation and the value of the equities of the Debtor's stockholders, and the objection of the Irving Trust Company, trustee of the State Line bond issue, saying as to all other objections (Tr. 5816):

> "We have considered other objections which we deem it unnecessary to discuss separately. They are all overruled."

All of Debtor's objections to the plan were overruled by the District Court and on appeal to the Circuit Court of Appeals were insisted upon, both on brief and in oral argument. All of the objections are regarded as meritorious and worthy of serious consideration and determination by this Court. The limits of this brief in support of the petition for writs of certiorari do not permit of detailed argument. Therefore, we content ourselves for the time being with a statement of the substance of those objections.

1. The maximum limit of capitalization of the reorganized company of $449,974,309 is entirely inadequate.

2. There is a value in the equities of the preferred and common stock.

3. Holders of convertible bonds of 1949 are entitled to an allocation of securities of the new company for the full amount of their claim.

4. The rate of interest on new Sioux City & Pacific Railroad bonds should not exceed 3½ per cent, the present rate of interest.

5. The rate of interest on new Des Plaines Valley bonds should not exceed 3 per cent.

6. The treatment accorded to the claim of Reconstruction Finance Corporation is unfair and inequitable to other creditors and to the stockholders.

7. The plan of reorganization should not allot securities for full interest on the claim of Reconstruction Finance Corporation and, as well, the full amount of interest on collateral held to secure said claim.

8. The plan should be modified so as to provide for the claim of Reconstruction Finance Corporation, either by issuing notes for the full amount of the claim with interest thereon at 4% as of the effective date of the

plan, or by issuing new securities for a portion of the claim, the balance to be represented by serial notes.

9. The provisions of the plan as to creation of a finance committee and delegation of authority thereto are unlawful.

10. The provisions in the plan for a voting trust are contrary to law, equity, and public interest.

11. Reorganization managers should be appointed by the Court and be under full control thereof.

12. The plan of reorganization should be modified so as to provide for the use of $13,100,000 bonds and a like amount of common stock for general corporate purposes, as the rehabilitation program which contemplated use of such securities has been otherwise provided for.

13. The Commission's forecast of earnings available for fixed charges is wholly unfounded and unacceptable as a basis for the capitalization of the reorganized company.

14. The plan of reorganization should have taken into consideration prospective earnings resulting from increased divisions of joint rates, reduced mileage rates on refrigerator cars, and operating economies aggregating not less than $3,840,000 annually.

15. To the extent that common stock reserved for general creditors is not required for that purpose, such reserved capital stock should be available for debenture holders.

16. A plan of reorganization should make provision for continuance of Debtor's pension system. (This objection was sustained by the District Court.)

17. In the absence of a determination and certification of value by the Commission in accordance with the

requirements of Section 77 (e), the findings of the Commission as to value under Section 19a of the Interstate Commerce Act are *prima facie* evidence of the value of the property of the Debtor, Chicago and North Western Railway Company.

18. The Commission should have considered the economies which might result from the consolidation of the properties of Debtor and of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, also in reorganization under Section 77, and if there are found to exist such possible economies, the plan of reorganization should have provided for such consolidation.

In addition to the specific objections above set forth, Debtor assigned additional errors which may be substantially stated as follows:

(a) No interest on claims after the date upon which petition for reorganization was filed in the District Court may be included in the capitalization.

(b) The effective date of the plan of reorganization should be July 1, 1935, the nearest convenient date to the date of filing of the petition.

(c) The decree confirming the plan of reorganization is void because (1) the Commission failed to advise creditors entitled to vote upon the plan of reorganization that appeals had been taken from the order of the District Court approving the plan, and (2) approval by the creditors of the plan of reorganization was not secured by lawful means.

(d) Creditors holding securities of more than one class may not vote all their securities in each class but must elect as to which class will be voted.

(e) The plan of reorganization is not feasible in that it fails to make reasonable provision for liability of the reorganized Debtor for Federal taxes.

In an appendix to this brief, we set forth a comparison of certain data of the Milwaukee and of the North Western, the authority for the data being shown in the appendix. The difference in treatment of the two properties in their respective plans of reorganization is striking. It will be noted, as of December 31, 1938, the total capitalization of the Milwaukee exceeded its rate-making value by $16,000,000, while the North Western's capitalization was $220,000,000 less than its rate-making value. Under the plans of reorganization as of January 1, 1939, the debts of the reorganized companies are practically the same; yet the fixed charges of the Milwaukee are approximately $900,000 greater than the fixed charges of the North Western.

The authorized preferred stock of the two reorganized companies is practically the same but the authorized common stock of the Milwaukee is approximately $95,000,000 greater than the common stock of the North Western. The reorganized Milwaukee has an authorized debt of 40.8 per cent of the total capitalization, while in the case of the North Western, the debt is 49.4 per cent of the total capitalization. Had the plan of reorganization of the North Western provided that the debt of $222,000,000 bear the same ratio to total capitalization as in the case of the Milwaukee the total capital stock of the reorganized Debtor would have been $322,000,000, an increase of $96,000,000. A comparison of the earning capacity of the two companies is shown on page 2 of the appendix to the brief, which shows the income for the year ending December 31, 1941, available for fixed charges, before income taxes.

There is also shown the application of the earnings of the two companies under certain assumptions as to tax liability, from which it clearly appears that the matter of income taxes and excess profits taxes is of the utmost

importance in determining the feasibility of the plan of reorganization. The Commission gave no consideration whatever to the effect of the plan on the liability of the reorganized Debtor for these taxes. District Judge Hincks, in his opinion on the plan of reorganization *In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor,* dated December 8, 1941, unreported, said: "Nevertheless in these days when tax problems loom large I think the Judge, before approving a plan, should have affirmative assurance that its feasibility is not jeopardized by liability for taxes which may accrue upon its consummation."

A computation made by the general auditor of Debtor's Trustee as to probable taxes of the reorganized company, based on the actual earning results for the year 1941, was filed in the Circuit Court of Appeals. It showed that the reorganized company, if the plan becomes effective as of January 1, 1939, would be compelled to pay a normal income tax of $2,498,436 and an excess profits tax of $5,584,567, a total of $8,083,000, on the basis of interpretations of the tax laws by the Commissioner of Internal Revenue. None of this tax would be due if the debtor company with its present security holders was the taxpayer. The proceedings should be remanded to the Commission for further consideration of the tax problem, as the present plan of reorganization is no longer feasible when considered under present tax laws.

CONCLUSION.

While these proceedings have consumed a period of almost seven years, there is no overwhelming requirement that there be an immediate termination of all efforts to obtain a fair and equitable plan of reorganization. During that period the trustees operating Debtor's properties have been able to pay all operating expenses and to maintain the property in superb condition without recourse to loans from any source. The statement in the opinion of the Circuit Court of Appeals, on page 5814, that "The Debtor has been solely dependent for the continuance of its operation, on aid from the R. F. C.," is not true; on December 31, 1941, as appears from the statement of the Trustee filed with the Circuit Court of Appeals, and constituting part of the record herein, there was cash on hand of $31,635,419.30. During 1941 the Trustee has paid the interest on claims of the creditors in accordance with the plan of reorganization for the calendar years 1939 and 1940 in excess of $9,000,000. (Tr. 5359, 5601-07)

It is, of course, highly desirable that these proceedings be terminated as early as is possible. Speed in determination must not be allowed to sacrifice the interests of justice. The proceedings should be terminated only after all important issues have been determined by this Court. For an intelligent determination as to whether the plan of reorganization is fair and equitable, findings by the Commission as to valuation of Debtor's properties, in accordance with the provisions of the last paragraph of Section 77 (e), are necessary.

No plan of reorganization under present Section 77 has been scrutinized by this Court. The laborious undertaking by all the parties to these various proceedings preliminary

to the determination by this Court of the questions of law involved under Section 77 have about been concluded, and the Court should, after the requisite valuation data has been made a matter of record, as required by law, lay down principles of law and rules of procedure which will be binding in all Section 77 proceedings.

We believe that the issues involved in these proceedings are so important that they should be considered and determined by this Court. These proceedings present an opportunity to make fully effective the purposes of the Congress in enacting Section 77.

Respectfully submitted,

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